

The Appeals Board (Board) finds that the issue dealing with temporary total disability compensation is not an issue over which the Board takes jurisdiction pursuant to

an appeal from a preliminary hearing.¹ The appeal of that issue is, therefore, dismissed. The Order of the Administrative Law Judge dealing with the penalties assessment should be reversed.

On March 19, 2002, an Order was issued by the Administrative Law Judge ordering temporary total disability compensation beginning February 11, 2002, and continuing until "the claimant is released to substantial and gainful employment."

Philip R. Mills, M.D., the authorized treating physician, examined claimant on May 20, 2002. At that time, claimant was in physical therapy under Dr. Mills' order. Dr. Mills in the May 20 report stated that claimant should continue the final weeks of physical therapy at which point "he will have reached maximum medical improvement . . ." Dr. Mills did state that if claimant should have a flare-up, an MRI would be reasonable and claimant could return to Dr. Mills for additional treatment, if necessary. Dr. Mills in the May 20 report placed permanent restrictions upon claimant of no lifting greater than 35 pounds. He also noted that pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.), claimant would have a DRE Lumbosacral Category II impairment, which, from the AMA *Guides*, equates to a 5 percent whole person impairment.

Physical therapy ended on June 6, 2002, and respondent ceased paying temporary total disability compensation at that time. On June 12, 2002, claimant telephoned Dr. Mills' office requesting additional treatment as he had apparently suffered a flare-up in his back. Dr. Mills arranged for claimant to undergo an MRI, with the test showing degenerative disc changes at L4-5 and to a lesser degree at L3-4. There was a focal disc bulge at L4-5, but no spinal stenosis or nerve root encroachment was identified.

On June 20, 2002, claimant served respondent and respondent's attorney with a 20-day demand by certified mail pursuant to K.S.A. 44-512a, requesting temporary total disability benefits.

On July 3, 2002, Dr. Mills placed claimant back on light duty.

K.S.A. 44-512a(a) requires a service of written demand setting forth with particularity the items of disability due.

¹ See K.S.A.44-534a and K.S.A. 2001 Supp. 44-551.

Claimant argues that respondent's failure to pay the temporary total disability compensation was unjustified, as "the only change in claimant's medical condition was a worsening of same, which was clearly anticipated in Dr. Mills' chart notes of May 20, 2002."

In reviewing Dr. Mills' May 20 office note, the Board considers Dr. Mills' opinion that claimant would have reached maximum medical improvement at the conclusion of physical therapy to be a release as contemplated by the Administrative Law Judge's Order. Dr. Mills found claimant to have a permanent 35-pound lifting restriction and, pursuant to the *AMA Guides*, assessed claimant a DRE Lumbosacral Category II permanent impairment, which equates to a 5 percent whole person impairment. Rather than anticipating a change, the medical report indicates to the Board that Dr. Mills concluded claimant had substantially improved and was medically stable. The only caution was that, should claimant have additional problems, he could return to Dr. Mills. That was not an expected result but, from Dr. Mills' language, rather a precaution. Additionally, claimant concluded physical therapy on June 6 and did not contact Dr. Mills about an aggravation until June 12. For nearly a week, it would seem claimant was at maximum medical improvement and was medically stable.

Finally, it is noted that when claimant did return to Dr. Mills for the MRI, rather than taking claimant off work, Dr. Mills merely returned claimant to light duty on July 3, 2002. The Board does not believe that respondent should have anticipated that claimant would be temporarily disabled for the period in question. There was no indication in the medical reports to support that conclusion. The medical evidence placed in the record does not justify penalizing respondent for failing to reach that less-than-obvious conclusion.

The Board further notes that the record is unclear as to what claimant's actual condition was as of the July 3, 2002 examination. The only physical findings dealt with paraspinal tightness and hamstring tightness to accompany the MRI findings. Additionally, it appears that claimant had returned to work, as the July 3 note of Dr. Mills states that claimant finds work difficult and that he had been lifting in excess of 50 pounds through the day.

Based upon these findings, the Board concludes that penalties under K.S.A. 44-512a are not appropriate. Therefore, that Order of the Administrative Law Judge is reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated August 8, 2002, awarding claimant penalties in the amount of \$250 should be, and is hereby, reversed. The Order granting claimant temporary total disability, however, remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of October 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David M. Bryan, Attorney for Claimant
John R. Emerson, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Director, Division of Workers Compensation